IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5481

HERBERT PHILLIP SCHLANGER,

Petitioner,

—v.—

HON. DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force; COL. HOMER A. BAKER, Commander, Moody Air Force Base, Georgia; COL. NOEL B. REDDRICK, Commander, AFROTC Det 25, Arizona State University,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5481

HERBERT PHILLIP SCHLANGER,

Petitioner,

—v.—

HON. DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force; COL. HOMER A. BAKER, Commander, Moody Air Force Base, Georgia; COL. NOEL B. REDDRICK, Commander, AFROTC Det 25, Arizona State University,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, nonpartisan organization engaged solely in the defense of those liberties guaranteed by the Bill of Rights. In its fifty-year existence it has been particularly concerned that procedural

* Letters of consent from the petitioner and the respondent to the filing of this brief have been filed with the Clerk of the Court.

remedies, particularly ones such as the Great Writ, be fully available to rectify the denial of civil liberties.

In recent years, the American Civil Liberties Union has provided legal representation to hundreds of servicemen who have sought release from military custody because their rights of free expression, religious liberty, or due process of law have been infringed. Habeas corpus has been the primary vehicle for safeguarding those substantive rights.

The decisions below take an unnecessarily restrictive view of the availability of habeas corpus to military petitioners. The writ has proven flexible in other contexts and on behalf of other types of petitioners. We believe it must be responsive to the newer types of demands represented in this case.

Statement of the Case

Herbert P. Schlanger enlisted in the United States Air Force on December 7, 1962. Three years later he re-enlisted for a period of six years and entered the Airman's Education and Commissioning Program (AECP). The AECP provided for "undergraduate education, followed by officer training and commissioning, for a selected number of carefully screened, career-minded airmen at selected civilian colleges and universities." [1]

In January, 1966, Sgt. Schlanger entered the AECP and was assigned to Wright-Patterson Air Force Base, Ohio "with duty at Arizona State University" (R. 2, 18); that duty was, primarily, the satisfactory completion of his

[1] "Guidebook for the AECP", p. 1 (AFIT, AU, WPAFB, O).

academic program.[2] In June of 1968, while progressing satisfactorily toward completion of his degree program and with his scheduled graduation only ten weeks away, petitioner was summarily removed from the program, ordered to withdraw from the University and placed in a state of arrest (R. 4). The removal was precipitated by his formation and leadership of the "ASU Civil Rights Board"—a campus organization which sought through mediation, communication and recourse to legal channels to alleviate growing racial tensions which had arisen on the ASU campus (R. 23, 24).

While Sgt. Schlanger was seeking an administrative remedy of his removal from the AECP program and denial of a commission, he was demoted and re-assigned to Moody Air Force Base, Georgia to complete the remainder of his six-year enlistment in a non-commissioned status (R. 5, 19).

On May 28, 1969, having unsuccessfully exhausted his administrative remedies (R. 5, 31) and having, in the opinion of his military superiors, performed his duties at Moody in an "outstanding manner,"[3] he was issued temporary duty (TDY) assignment orders which re-assigned him to Arizona State University to complete, under a different program at his own expense, his degree requirements. These orders assigned him to Tempe, Arizona, for a period of 85 days (June 4 through August 29, 1969), seventy days of which were designated as "duty" and 15 as "leave." The precise distribution between these two categories was not specified.

---

[2] "AFIT Student Manual", para. 1-7.

[3] This characterization of Sgt. Schlanger's service is reflected in his performance reports, letter of recognition and recommendation of this TDY.

On August 27, 1969, Sgt. Schlanger filed his application for a writ of habeas corpus in the United States District Court of Arizona. At that time, as before, he was present within that jurisdiction pursuant to the temporary duty assignment orders issued from Moody AFB, Georgia. Furthermore, he was clearly within the period of time covered by these orders. He named as respondents Dr. Robert Seamans, the Secretary of the Air Force, Colonel Homer Baker, the Commander at Moody AFB and Colonel Noel Reddrick, the Commander of the Air Force ROTC detachment at Arizona State University.

The petition was summarily dismissed by District Judge Copple on August 29, 1969 and reconsideration was denied on September 5, 1969. Sgt. Schlanger filed his appeal and returned, as ordered, to Moody AFB, Georgia. He was subsequently granted leave from Moody on December 9, 1969, in order to argue his appeal to the Ninth Circuit. That Court vacated and remanded for further consideration.

Thereafter, the District Court, per Judge Copple, dismissed the petition for lack of jurisdiction, because "neither the Secretary [of the Air Force] nor the commanding officer is within the territorial jurisdiction of the District Court or within reach of the Court's process . . . " *Schlanger* v. *Seamans,* 3 SSLR 3323 (D. Ariz. 1970). The essence of the ruling was that there was no proper respondent within the district. The opinion did not discuss the effect of joining Colonel Reddrick as a respondent. The United States Court of Appeals affirmed in a one paragraph order, concluding that the case was indistinguishable from its earlier decision in *Jarrett* v. *Resor,* 426 F.2d 213 (9th Cir. 1970).

Introduction

ARGUMENT

The District Court held that it was without jurisdiction to entertain this habeas corpus application because there was no proper respondent in the district. The Court of Appeals, however, affirmed on the basis of an earlier ruling which explicitly did not reach the issue of whether the respondents must be within the District before the writ can issue. See *Jarrett* v. *Resor, supra* at 217. What *Jarrett* did decide—which is presumably the rule of law applied to petitioner here—was that a serviceman on leave status within a district is not "in custody" there for the purposes of 28 U.S.C. §2241. *Amicus* submits that both propositions are incorrect. The petitioner was "in custody" within the district of Arizona at the time he filed this application and the District Court had jurisdiction over the respondents.

We advance two premises for our argument. First, the Great Writ is "one of the basic safeguards of personal liberty," and the "statutes governing its use must be generously construed if the great office of the writ is not to be impaired." *Hirota* v. *MacArthur,* 338 U.S. 197, 201 (1949) (Mr. Justice Douglas, concurring). Accordingly its contemporary reach must accommodate the claims of a new class of petitioners like Sgt. Schlanger whose confinement is of a type not foreseen decades ago.

Second, for purposes of this type of uniquely federal litigation—a lawsuit brought in a District Court by a United States serviceman against United States officials, seeking to vindicate rights steeped in federal constitutional, statutory and regulatory law,—traditional, rigid concepts of the

territorial jurisdiction of a particular District Court are outmoded. Rather, in this type of suit the federal courts in effect constitute one nation-wide "district" where limitations on the choice of forum should be based on concepts of venue and the doctrine of *forum non conveniens*. Viewed from this perspective, territorial niceties are of diminished importance, this Court's opinion in *Ahrens* v. *Clark*, 335 U.S. 188 (1948) emerges as a venue decision, and this habeas corpus petition was properly brought in the District of Arizona.

I.

For the purposes of the habeas corpus statute, a serviceman is "in custody" at least in any district where he is assigned.

It is undisputed that the petitioner was physically present within the District of Arizona when he filed his application. Thus, the very threshold requirement of jurisdiction, even under the traditional view expressed in *Ahrens*, has been met. The issue is whether his relationship to the military was such that he was "in custody" there for habeas corpus purposes. By relying on *Jarrett*, the Court of Appeals impliedly ruled that he was not and therefore did not make the further inquiry concerning whether an appropriate respondent was within the jurisdiction.

A. *The changing concepts of "custody"*

In *Ahrens* v. *Clark*, *supra* this Court noted that,

> . . . the view that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or de-

> tained within the territorial jurisdiction of the Court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. 335 U.S. at 192 (footnote omitted).

Whatever may be said about whether *Ahrens* v. *Clark* was correctly decided or about its reading of legislative history and policy considerations, see *Developments-Federal Habeas Corpus*, 83 HARV. L. REV. 1160-65, or, indeed, whether it has continuing vitality, *cf. Nelson* v. *George*, 26 L. Ed.2d 578, 582, n. 5 (1970), it is apparent that the judicial concept of custody has changed radically in the interim. When the existing habeas corpus statute was enacted, "custody" was virtually synonymous with actual physical constraint and confinement. The only remedy which could be sought was immediate release.

The changing concept of custody was carefully traced by District Judge Northrup in deciding a case quite similar to this one,

> While it is true that custody is an essential element of a petition for habeas corpus relief, it is also true that the nature of the custody considered sufficient for habeas corpus has undergone significant conceptual change. At one time habeas corpus would lie only for those prisoners in actual confinement for the offense which was the subject of their petition. See, e.g. *Jones* v. *Cunningham*, 371 U.S. 236, 238, 83 S. Ct. 373, 9 L. Ed.2d 285 (1963); *McNally* v. *Hill*, 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934). This notion of custody has expanded, however, and the writ is now looked on as a procedural device for subjecting restraints on liberty, although often short of actual physi-

cal confinement, to judicial scrutiny. It is used to test convictions before service of sentence for that offense has actually begun, *Peyton* v. *Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 426 (1968); to test a conviction while the petitioner is on parole, *Jones* v. *Cunningham*, supra; and test the validity of a conviction even after the prisoner's unconditional release, *Carafas* v. *LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed.2d 554 (1968). This line of cases constitutes recognition of the fact that restraints on liberty short of physical confinement can be of such magnitude as to warrant the protection of the writ of habeas corpus, as "both the symbol and guardian of individual liberty." *Peyton* v. *Rowe*, 391 U.S. at 58, 88 S. Ct. at 1551. Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. at 243, 83 S. Ct. at 377. *Donigian* v. *Laird*, 308 F. Supp. 449, 451 (D. Mary. 1969).

This modern concept of custody for habeas corpus purposes has been applied in a manner which would have been doctrinally impossible when *Ahrens* was decided. *E.g.*, *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969); *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grounds*, 26 L. Ed.2d 578 (1970); *United States ex rel. Meadows* v. *State of New York*, 426 F.2d 1176 (2d Cir. 1970). For the petitioner challenging a criminal conviction, a flexible concept of custody has been utilized to render the Great Writ responsive to the needs of the situation.

B. *"Custody" by the military*

In light of this judicial trend, it is not surprising that there has been a similar expansion of the availability of the writ to those who seek their release from the armed services. This Court, as well as numerous lower federal courts, have long recognized that one's mere membership in the military—active or inactive—is a sufficient state of custody to permit habeas corpus relief. As Mr. Justice Douglas stated in *Scaggs* v. *Larsen*, 90 S. Ct. 5 (1969):

> The Great Writ was designed to protect every person from being detained, restrained or confined by any branch or agency of government. In these days, it serves no higher function than when . . . the military act[s] lawlessly.

See, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304 (1946); *Oestereich* v. *Selective Service Local Board No. 11*, 393 U.S. 233 (1968); *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Daoust* v. *Laird*, —— F.2d ——, 3 SSLR 3217 (D.C. Cir. 1970); *United States ex rel. Altieri* v. *Flint*, 54 F. Supp. 889 (D. Conn. 1943), *aff'd on opinion below*, 142 F.2d 62 (2d Cir. 1944); *United States ex rel. Barr* v. *Resor*, 309 F. Supp. 917 (D.C.D.C. 1970); *Donigian* v. *Laird*, *supra*; *Kepple* v. *Laird*, 3 SSLR 3148 (D.C.D.C. 1970); *United States ex rel. Lohmeyer* v. *Laird*, 3 SSLR 3072 (D. Mary. 1970). Indeed, even the Ninth Circuit has recently criticized a restrictive view of the custody requirement in military habeas corpus cases: "[t]he more contemporary view, however, is that actual physical restraint is not necessary and that one need only show a potential restraint upon his liberty to seek habeas corpus relief." *Johnson* v. *Laird*, —— F.2d —— (9th Cir., No. 25383, Nov. 24, 1970), slip opinion, p. 6.

The nature of military custody is far-reaching. Petitioner is subject to courts-martial jurisdiction, for service-connected offenses, throughout the world. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); 10 U.S.C. Sections 801 *et seq.* (Uniform Code of Military Justice). The Secretary of Defense and the Secretary of the Air Force have custodial control over the petitioner wherever he goes. *Daoust* v. *Laird, supra; Kepple* v. *Laird, supra; U. S. ex rel. Barr* v. *Resor, supra.*[4] Indeed, in this very case, the petitioner, while pursuing his studies at the University, was placed in a state of arrest upon the order of his then-commanding officer at Wright-Patterson Air Force Base in Ohio. A man subject to that type of restraint and control is "in custody." If a reservist seeking release from the Armed services is found to be in sufficient custody to seek habeas corpus relief, see, *e.g., Hammond* v. *Lenfest, supra,* then *a fortiori,* one on active duty who seeks the same relief is entitled to the same remedy. The applicability in the military context of these modern notions of custody is and has been compelling:

> In view of this line of cases broadening the concept of "custody" from an actual physical custody to a significant restraint on liberty, it is not surprising, therefore, that one subject to military orders or control has of late uniformly been found by the courts to be "in custody" as that term is used in section 2241 . . . and hence one authorized to seek habeas corpus relief. *U. S. ex rel. Lohmeyer* v. *Laird, supra,* at 3072.

Judge Northrup summed it up succinctly: " . . . to hold that retention in the Armed Forces is not a sufficient re-

[4] These three cases involved petitioners who were all in Vietnam at the time their habeas corpus actions were commenced in the District of Columbia district court.

straint on liberty would be to ignore the realities of life." *Donigian* v. *Laird*, *supra* at 451.

C. *The locus of custody*

While a serviceman is in custody wherever he may be, for the purposes of interpreting the habeas corpus statute and in the context of this case the Court need only hold that a petitioner is in custody in any district where he is assigned.

Apparently the petitioner was not due back at Moody Air Force Base, Georgia until August 29, 1969. It is unclear whether his status on August 27, the day he filed his petition, was one of active duty or leave. But it is clear that petitioner had been assigned to Arizona and was not unlawfully there. It was there that his commanding officers could direct and control him, as had occurred in 1968 when petitioner was dropped from the officers' program and placed in arrest.

Many courts have come to agree that a person who is confined or restrained in some way, can be in custody within the district where he is located even though his custodian is elsewhere. It is the actual or potential restraint upon the petitioner that places the locus of custody in the District where the effects of that restraint are felt.

Donigian v. *Laird*, *supra* reflects this concept. There, an Army lieutenant, unattached to any unit, was attending Johns Hopkins University at his own choice and expense. He sought a writ of habeas corpus seeking release from the Army following the wrongful denial of his application for discharge as a conscientious objector. The Government argued that Donigian could only sue in Indiana, the district in which the Army Personnel Operations Center was located. Judge Northrup rejected the contention, stating,

> The Army seeks to exert control over Donigian in Maryland. It cannot then avoid the jurisdiction of this court merely because such control is exercised from a point located outside the state. . . . The overpowering factor in this inquiry is that the Army, regardless of where its command is physically located, is such a pervasive force that its effects are felt wherever those under its command are stationed. 308 F. Supp. at 453.

Accord, United States ex rel. Anderson v. Laird, supra. This approach has been adopted by other federal courts ruling upon habeas corpus petitions filed by military personnel and holding that jurisdiction exists wherever the petitioner is. *E.g.*, *Lowrey v. Resor*, 306 F. Supp. 926 (D. Mass. 1969); *Rice v. Resor*, 304 F. Supp. 337 (W.D. Pa. 1969); *Gilbertson v. Resor*, 306 F. Supp. 1053 (D. Mass. 1969), rev'd on other grounds, 429 F.2d 962 (1st Cir. 1970).

Only two limitations on this broad principle—that the petitioner is confined in any district where is lawfully present—have emerged. First, that the petitioner cannot be AWOL, since then he can be said not to be in custody anywhere. Thus, in *United States ex rel. Roderick v. Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969), where the petitioner, by his own choice, had not only brought suit in a district totally unrelated to his military service, but was in fact AWOL during most of the judicial proceedings, the Second Circuit observed,

> ". . . it is doubtful whether a soldier who is absent without leave can be characterized as within the custody of any officer of the Armed Forces anymore than

it can be said that an escaped prisoner is in the custody of his jailer." 412 F.2d at 21.

Second, and similarly, the courts have also refused to entertain the application of a serviceman who has come into a district for transparent forum-shopping purposes. *Compare McKay* v. *Secretary of the Air Force,* 306 F. Supp. 1252 (D. Mass. 1969) (the petitioner had no "substantial relation" to the district) *with, Feliciano* v. *Laird,* 426 F.2d 424, 427, n. 4 (2 Cir. 1970) ("Whatever the mysteries of Army bookkeeping might ordain . . . the fact that Feliciano has been in this district and attached to Fort Wadsworth for over three months cannot be ignored"), and *Laxer* v. *Cushman, supra* at 924, n. 5 ("The fear of forum-shopping in a distant forum . . . is not present here. This district is the district in which petitioner has been subjected to military control for the past six months. . . . "). Sgt. Schlanger was assigned to and had been in the district for a substantial period of time when he filed this application. He was lawfully there, and his choice of that forum was certainly not made in bad faith.

The principle of the locus of custody which *amicus* urges this Court to accept with regard to members of the armed forces has been recognized in more traditional habeas corpus contexts. *E.g., Word* v. *North Carolina, supra; George* v. *Nelson, supra; United States ex rel. Meadows* v. *State of New York, supra.* In those cases, prisoners confined in one jurisdiction sought to challenge convictions imposed by other jurisdictions which subjected the prisoners to future restraints on their liberty. The three decisions above all agreed that suit could be brought in the federal district of confinement, although the "custodian" of

the prisoner was elsewhere. The only substantial disagreement was over which of the two districts exercising concurrent jurisdiction would be the most appropriate forum for the application to be heard.

Decisions such as these, which refuse to allow strict territorial concepts to frustrate the purposes of the Great Writ, guide the way for resolution of this case. The petitioner was physically present in Arizona, his presence was pursuant to orders and in good faith, he was in the custody of the Air Force, which custody he questioned, and the effects of that custody were manifest upon him in Arizona. He was therefore "in custody" within that district and this Court should so hold.

II.

The Arizona District Court had jurisdiction over the respondents and was a proper forum for this action.

The District Court held that there was no respondent subject to the personal jurisdiction or process of that Court. For many of the reasons advanced in Point I, *supra*, as well as those suggested *infra*, any District Court where a serviceman is in constructive custody has jurisdiction over his appropriate commanding officers. The only limits on the exercise of that jurisdiction should be those of convenience.

A. *The Court had jurisdiction*

For most members of the Armed services who seek the aid of the federal courts to secure their release from the military, the kinds of problems raised here are non-existent.

The serviceman is stationed at a particular place, his commanding officer is at the same location and the court can usually proceed directly to a disposition of the merits of the application.

But a new class of military habeas corpus petitioners has come into existence. Like Sgt. Schlanger they may be servicemen on active duty assigned to temporary duty at a place in a different federal district from their commanding officer. Or they may be soldiers between duty stations, or reservists unattached to a particular command or to a command in a different state. As with prisoners seeking to challenge out-of-state convictions, the courts have attempted to construe the jurisdictional statutes so as to allow a resolution of the merits and not subject this new type of petitioner to a jurisdictional whipsaw.

One approach has been to find the commanding officer to be amenable to the court's jurisdiction because he exercises control or custody over the petitioner there. *E.g.*, *Donigian* v. *Laird*, *supra*. Custody is a two-way street; it is the linchpin of jurisdiction over both the petitioner and his commander. The authority of the commanding officer over the military petitioner is what renders the serviceman both "in custody" and in custody in the district where he is assigned. See Point I, *supra*. Simultaneously, that same authority of the commanding officer is what subjects him to the jurisdiction of that district. As Judge Northrup put it:

> "The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this Court merely because such control is exercised from a point located outside of this state." *Donigian* v. *Laird*, *supra*, at 453.

The concept that the respondent is present where his effects are manifested on the petitioner, has been employed in other military habeas corpus cases. *E.g. Laxer* v. *Cushman, supra.* The petitioner's commanding officer at Moody Air Force Base exercised actual and potential control over the petitioner in Arizona, just as the petitioner's previous commanding officer at Wright-Patterson Air Force Base, Ohio had, in fact, done. This impact on petitioner in the district of Arizona is sufficient to have given that court jurisdiction over Colonel Baker for the purposes of testing that official's right to continue to exercise custody of the petitioner. There is no constitutionally significant distinction between the power which Colonel Baker had over petitioner and the power of a state which files a detainer against a prisoner. Cf., *George* v. *Nelson, supra; United States ex rel. Meadows* v. *State of New York, supra.* The detainer is merely a physical embodiment of a claim to future custody over the person. If anything, Colonel Baker's potential for control over the petitioner was more immediate.

In certain respects, the jurisdictional principle recognized in these habeas corpus cases is similar to one which stems from this Court's decision in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and has fostered the new jurisdictional regimes of the "long-arm" statutes. In *International Shoe,* this Court held that the activities of a corporation can establish "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. at 320. Under modern concepts of *in personam* jurisdiction, the

fact that a defendant has had a significant impact in a state is sufficient to allow that state to exercise jurisdiction over him in connection with claims arising from that relationship. Conceptually, the continuing effects which Colonel Baker had over petitioner in the district of Arizona provide the same basis for jurisdiction. For habeas corpus purposes, Colonel Baker was a proper respondent amenable to the jurisdiction of the Arizona Court.

A second and similar approach to the question of jurisdiction over military commanders has been based upon a broad reading of 28 U.S.C. Section 1391(e). That section provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or . . . (4) the plaintiff resides . . .

Service of papers may be made by certified mail "beyond the territorial limits" of the district in which the action is brought. Although the statute is denominated a venue provision, by allowing jurisdiction over federal officials who may be outside the district where the suit is filed and providing for valid service by mail, the statute has, realistically, extended the extraterritorial jurisdiction of the federal courts in suits against federal officers. In a sense this is a kind of long-arm statute which enables a District Court to reach across district lines and assert jurisdiction over a federal official whose official conduct has had some effect within the forum.

District Judge Gourley, in a case involving efforts to enjoin the activation of a Pennsylvania national guardsman, found that section 1391 (e) gave the District Court in Pennsylvania jurisdiction over Secretary of Defense Melvin Laird:

> Although Section 1391 ostensibly is concerned with venue as distinguished from jurisdiction, Professor Moore concludes that the addition of subsection (e) was, in fact, intended to extend the extraterritorial jurisdiction of federal district courts where each of the named defendants are officers, employees, or agencies of the United States. 2 J. Moore, Federal Practice, paragraph 4.29, at 1210-11 (2 ed. 1967). This is confirmed by a reading of Sen. Rep. No. 1992, 87th Cong., 2d Sess., to accompany HR 1960, 2 U.S. Code Cong. and Adm. News (1962) p. 2784. I therefore conclude that the Court does have authority to exercise extraterritorial jurisdiction in the circumstances contemplated by Section 1391. *Metz* v. *United States, supra* at 209.

The District Court in *United States ex rel. Lohmeyer* v. *Laird,* similarly relied on section 1391 to find it had jurisdiction over a petitioner seeking release from the Army:

> In the instant case the petitioner is a resident of Maryland. Hence, under section 1391 (e) (4) of Title 28 suit was properly brought in this district. Extraterritorial service of process was effected on the Honorable Stanley Resor, Secretary of the Army and on Major General K. G. Wickham, Adjutant General of the Army, by certified mail pursuant to the statutory authorization of section 1391(e) and personal service

> was effected upon the Honorable Melvin Laird, Secretary of Defense, pursuant to the provisions of Rule 4(d), F.R.C.P., 28 U.S.C. This court concludes therefore that having jurisdiction over the subject matter, having venue jurisdiction and having jurisdiction over the respondents this case is properly before the court. (Footnote omitted) 3 SSLR at 3074.

Accord, Silberberg v. *Willis, supra.* Such interpretations of Section 1391 (e) are consonant with this Court's statement in *Ex Parte Endo,* 323 U.S. 283, 306 (1944): "But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner." The statute placed these respondents within reach of the Arizona Court's process.

Both of these approaches to the problems of the military petitioner recognize that in federal court litigation involving federal claims against United States officials, jurisdictional barriers based on concepts of territoriality must give way. Section 1391 (e) is an implicit recognition of such a concept. Especially when the availability of habeas corpus relief is at issue, strict concepts of territorial jurisdiction over the federal respondent are an anomoly in our highly mobile society. See, *e.g., Word* v. *North Carolina, supra; Harris* v. *Ciccone,* 417 F.2d 479 (8th Cir. 1969) (per Blackmun, C.J.) cert. denied, 397 U.S. 1078 (1970); *Holland* v. *Ciccone,* 386 F.2d 825 (8th Cir. 1967) cert. denied, 390 U.S. 1045 (1968). A contemporary perspective is particularly necessary where the federal defendants are military or defense officials who have the power to order servicemen to any one of the hundreds of military installations spread throughout our nation.

Moreover, there are no policy inhibitions which should prevent this Court from ruling that the respondents were subject to the jurisdiction of the Arizona District Court. First, such a ruling would present no problems of federalism or comity as between state and federal officials or courts. *Compare Word* v. *North Carolina, supra; United States ex rel. Meadows* v. *State of New York, supra; George* v. *Nelson, supra.* Here the parties, the custody, the claims and the interests are solely and completely federal. Second, the rule which *amicus* urges upon the Court does not allow forum-shopping. The primary forum would be the one where the petitioner was assigned. Third, the government is not disadvantaged because its attorneys are in every district. Most habeas corpus applications could probably be adjudicated on the administrative record, without need to transport witnesses or officials. The inconveniences to a federal prisoner which flow from the venue scheme of section 2255 were not found sufficient to overturn the arrangement. See *United States* v. *Hayman,* 342 U.S. 205 (1952). Conceivable inconvenience to the government should not be the basis for a narrow construction of section 2241. Finally, one would assume that the particular federal court would not meet difficulty in attempting to secure compliance by federal officials with its orders. See *Ex Parte Endo,* 323 U.S. 283 (1944), cf. *Feliciano* v. *Laird, supra* at 427, n. 4. At the very least, since service of the court's process can be effected beyond the limits of the district, the respondents could be directed to comply with the court's directives. Similarly there would be no problems of bringing the petitioner before the Court since he is already there. *Compare Ahrens* v. *Clark, supra.*

In sum, the habeas corpus statute can and must be construed to hold that the District Court had jurisdiction over the respondents in this case; such a holding is not foreclosed by considerations of policy or efficiency. Indeed, if the habeas corpus application was not properly brought in the District of Arizona, then it is questionable whether it could have been brought anywhere at all, see *Ahrens* v. *Clark, supra; but see, e.g., Word* v. *North Carolina, supra,* —a result in violation of Article I, section 9 of the Constitution.

B. *The forum was proper*

There is little that *amicus* can add to petitioner's discuscussion of these matters. It is apparent that the choice of forum was eminently made in good faith. The petitioner was there and the events which gave rise to his claim for release from the Air Force occurred there. The District of Arizona was the effective equivalent of the sentencing court. See *United States ex rel. Meadows* v. *State of New York, supra; Word* v. *North Carolina, supra.* The jurisdictional propositions suggested above provide ample control on forum-shopping.

CONCLUSION

For the reasons set forth above, *amicus* submits that the decision below should be reversed and remanded for consideration of petitioner's claims.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
*Attorneys for Amicus Curiae**

---

* Attorneys for *amicus curiae* wish to express their appreciation to Edwin J. Oppenheimer, Director of the New York Civil Liberties Union Selective Service and Military Law Panel, for his invaluable assistance in the preparation of this brief.